

RULEMAKING NOTICE

Notice Number	Rule Number	Env-Wt 501.01, Env-Wt 501.02(a)(6)&(7), Env-Wt 501.05-501.07; Env-Wt 800
1. Agency Name & Address: NH Department of Environmental Services 29 Hazen Drive P.O. Box 95 Concord, NH 03302-0095	2. RSA Authority:	RSA 482-A:11, I; RSA 482-A:31, I-III Clean Water Act § 404; 33 CFR Parts 325 & 332
	3. Federal Authority:	
	4. Type of Action:	
	Adoption	<u> X </u>
	Amendment	<u> </u>
	Repeal	<u> </u>
	Readoption	<u> X </u>
	Readoption w/amendment	<u> X </u>

5. Short Title: Wetlands Mitigation Rules

6. (a) Summary of what the rule says and of any proposed amendments:

The existing rules in Env-Wt 800, Compensatory Mitigation, establish the procedures and substantive requirements that apply when compensatory mitigation is required for unavoidable impacts to aquatic resources. Specifically, the rules establish acceptable forms of permittee-responsible (tangible) mitigation (such as restoring wetlands or creating conservation easements), the amount of mitigation required, the information needed for a mitigation proposal to be deemed complete, the criteria used to evaluate mitigation proposals, the requirements for substituting an in-lieu mitigation payment for tangible mitigation, use of the Aquatic Resources [Compensatory] Mitigation (ARM) Fund established by RSA 482-A:29, requirements for ARM Fund applicants, and ARM Fund project evaluation criteria. Certain rules in Env-Wt 500 also relate directly to compensatory mitigation; those rules establish the review process for mitigation proposals, data requirements, the mitigation sequence process, what items are needed for a mitigation proposal to be deemed complete, and what is involved in the review of mitigation proposals. While some of the mitigation rules were readopted with amendments in 2010, most of the rules are scheduled to expire on June 20, 2015, and so are proposed to be readopted. **The existing rules will continue in effect pursuant to RSA 541-A:14-a, I, subject to the conditions specified therein.** As part of the readoption, amendments are being proposed to (1) clarify existing requirements, (2) improve the process for submitting and evaluating wetland mitigation proposals, and (3) align the rules with revisions to RSA 482-A:29 and federal requirements. The proposed changes are intended to clarify the permitting process when compensatory mitigation is required and better explain how the ARM Fund operates. The more significant revisions are described below.

Many existing requirements are proposed to be clarified. Clarifications in Env-Wt 501.01 include revisions to align the section with changes made in 2014 to RSA 482-A:3, I.

The more significant clarifications in Env-Wt 800 include the following:

- The plan and report that are common to all mitigation proposals would be explained in a single section, and only the information that differs based on whether the proposal is for wetlands *vs.* streams and permittee-responsible *vs.* in-lieu payment would be separated into separate sections, to eliminate redundancy from the existing rules and ensure that the core requirements are the same across the board;
- The concept of “preservation of upland buffer” would be more accurately called “aquatic resource buffer preservation”;
- The need for applicants to consult with the U.S. Army Corps of Engineers about mitigation for projects that also require a federal permit would be stated explicitly;
- The provisions about denying an application if an in-lieu mitigation payment is not made would be much clearer;
- The rules would explicitly state that jurisdictional areas on the project site that are left undisturbed as part of meeting the avoidance and minimization requirements cannot be counted as mitigation in the form of preservation.

The existing requirement in Env-Wt 500 that would be changed is that the 1-acre and 3-acre thresholds in the existing rules for in-lieu payments would be eliminated (to reflect statutory changes).

Existing requirements in Env-Wt 800 that would be changed include the following:

- The mitigation monitoring report currently required by 805.02(m) would be moved to a separate section and aligned with federal requirements, which require the applicant to establish performance standards for the mitigation project, describe in greater detail how the monitoring will be done and who will do it, and monitor for at least 5 growing seasons (instead of the 3 seasons implied by the existing rules);
- Table 800-1, Minimum Compensatory Mitigation Ratios, would be revised to include "Enhancement" as a separate category (federal requirement);
- The potential overlap of wetlands impacts and stream impacts within a single project would be addressed for purposes of calculating an in-lieu payment;
- DES would be required to solicit proposals for ARM Fund monies at least once every 2 years (not just 2 years after receipt of a payment);
- The requirement for ARM Fund applications to include a budget would be stated explicitly;
- Eligibility criteria for ARM Fund monies would be adjusted, including by adding a requirement for land conservation proposals that the resources within the conservation interest area are under threat of destruction or adverse modifications by reasonably foreseeable activities (federal requirement);
- A 120-day time limit would be added for the Site Selection Committee to review and rank projects.

New requirement(s) being proposed are as follows:

In Env-Wt 500, a requirement is proposed to be added for an applicant to have a pre-application meeting if compensatory mitigation will be required for a proposed project. The meeting would be to discuss and coordinate review of the project and potential compensatory mitigation proposals early in the process.

In Env-Wt 800, requirements proposed to be added are as follows:

- Applicants would have to review a list of local mitigation projects from the municipality if one has been prepared (801.03(a));
- An additional methodology would be identified that could be used when evaluating wetland functions within a development site and for the proposed mitigation site;
- Requirements specific to stream impacts and stream mitigation projects would be added;
- Limitations on proposing wetlands or vernal pool creation would be established;
- A new Part Env-Wt 806 would be added to establish requirements for stream restoration or enhancement projects, including goals, types of projects, and information and plans required to be submitted;
- An option would be added for a permittee who proposed permittee-responsible mitigation to request the substitution of an in-lieu payment if it becomes apparent that the mitigation project will not be successful;
- Provisions to adjust a mitigation monitoring plan would be added (including terminating it sooner if the objectives have been met);
- Provisions to account for stream in-lieu payments separately from wetland in-lieu payments would be added;
- Any person wishing to obtain ARM Funds would have to submit a pre-proposal so an eligibility determination could be made early on (before a great deal of time and effort has been put into a proposal);
- ARM Fund pre-proposals and applications would have to be signed; and
- Criteria for evaluating applications for stream passage improvement projects would be established.

6. (b) Brief description of the groups affected:

The rules affect any individual or entity that undertakes activities regulated under RSA 482-A for which mitigation will be required for permanent impacts to aquatic resources.

6. (c) Specific section(s) of state statute or federal statute or regulation which the rule is intended to implement:

Rule Section(s)	State Statute(s) Implemented	Federal Statutes/Regulations Implemented
Env-Wt 501.01, 501.02(a)(6)&(7), 501.05-501.07; Env-Wt 800	RSA 482-A:3, I; RSA 482-A:11; RSA 482-A:28-33	Clean Water Act Section 404; 33 CFR Parts 325 & 332

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name:	Lori Sommer	Title:	Wetland Mitigation Coordinator
Address:	NH Dept. of Environmental Services 29 Hazen Drive; P.O. Box 95 Concord, NH 03302-0095	Phone #:	(603) 271-4059
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		E-mail:	

The rules also can be viewed in PDF at

<http://des.nh.gov/organization/commissioner/legal/rulemaking/index.htm>

TTY/TDD Access: Relay NH 1-

800-735-2964 or dial 711 (in NH)

8. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **4:00 p.m. on August 14, 2015**

☒ Fax

☒ E-mail

☐ Other format (specify):

9. Public hearing scheduled for:

Date and Time: **July 30, 2015 at 1:00 PM**

Place: **Rooms 112-114, DES Offices, 29 Hazen Drive, Concord NH**

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant): FIS # 15:104 , dated 6/11/15:

1. Comparison of the costs of the proposed rule(s) to the existing rule(s):

When compared to the existing rules, the proposed rules will have an indeterminable impact on costs to State citizens and independently owned businesses and may increase state restricted revenue by an indeterminable amount. Any costs associated with the proposed rule Env-Wt 803.07(e) are attributable to RSA 482-A:30-a.

2. Cite the Federal mandate. Identify the impact on state funds:

No federal mandate, no impact on state funds. The U.S. Army Corps of Engineers has concurrent jurisdiction over most projects in NH that require a permit under RSA 482-A:3, I. The vast majority of such projects are covered under the NH State Programmatic General Permit issued by the U.S. Army Corps of Engineers. The U.S. Army Corps of Engineers does not require rules regarding mitigation, however without rules every applicant for a permit under RSA 482-A:3, I would also need to apply to the U.S. Army Corps of Engineers for a permit.

3. Cost and benefits of the proposed rule(s):

To the extent a State citizen or independently owned business applies for a standard dredge and fill permit for a project for which mitigation is required, they may have increased costs associated with preparing for and travelling to the proposed pre-application meeting. The Department anticipates any costs associated with the pre-application meeting may be offset by a reduction in costs associated with having to revise a mitigation proposal after it has been submitted because it does not meet applicable requirements. The impact on costs is indeterminable for State citizens and independently owned businesses that apply for a standard dredge and fill permit for a project for which mitigation is required. There is no impact on political subdivisions. Any costs associated with proposed rule Env-Wt 803.07(e) are attributable to RSA 482-A:30-a.

A. To State general or State special funds:

The proposed rules may increase revenue to the Aquatic Resources Mitigation fund by an indeterminable amount as a result of in-lieu mitigation payments increasing due to the proposed elimination of certain area limitations and the addition of an option to pay into the fund if a permittee-responsible mitigation project cannot meet its objective.

B. To State citizens and political subdivisions:

See 3 above.

C. To independently owned businesses:

See 3 above.

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution:

None of the proposed revisions affect the reduced permitting requirements available for the vast majority of public projects, so no costs or benefits to political subdivisions of the state are anticipated as a result of adopting the proposed rules. The rules thus do not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures, and so do not violate Part I, Article 28-a of the N.H. Constitution.